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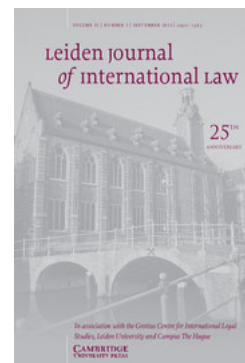
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**Interpretation: The IMF and International Law, by J. Gold, Kluwer Law International, London/The Hague/Boston, 1996, ISBN 90-411-0887-4, xxxi and 641 pp., US\$ 167,50/UK£ 99/Dfl. 291,50.**

Erik Denters

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*Interpretation: The IMF and International Law*, by J. Gold, Kluwer Law International, London/The Hague/Boston, 1996, ISBN 90-411-0887-4, xxxi and 641 pp., US\$ 167,50/UK£ 99/Dfl. 291,50.

Contrary to what the title of this volume suggests, the role of international law is only marginal when the IMF interprets its Articles of Agreement.<sup>1</sup> Generally recognized rules of treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties,<sup>2</sup> are less relevant because the IMF does not follow the hierarchy of techniques that the law of treaties prescribes. Instead the author describes IMF's practice on interpretation as 'eclectic' whereby multiple techniques may be applied in finding the true meaning of the language of text. From a variety of methods available, there appears to be a preference for the teleological approach because the closing sentence of Article I of the IMF's constitution – stating the organization's purposes – stipulates that "the Fund shall be guided in all its policies and decisions by the purposes set forth in this article".

The author has interpreted the process of interpretation in a wide manner. All acts by the IMF are deemed to be interpretations (or misinterpretations). Even non-interpretations may be deliberate interpretations. Interpretation as a juridical process by analyzing texts is only a limited activity. Decisions and policies of the Executive Board and the Board of Governors or even statements made by the Managing-Director are held to be interpretations because they are all supposed to act within the jurisdiction of the IMF and the competences allocated to them. In this sense this book is also a discussion on key policies and decisions of the IMF since its establishment. It focuses both on the presence and on the absence of such policies and decisions. This explains the extent of this study and the apparent necessity to discuss issues on which the author has already published extensively.

Gold distinguishes two distinctive paths for interpretation that the IMF may follow: the authoritative and the informal path. The first procedure is elaborated in Article XXIX of the Articles of Agreement (discussed in Chapter 1). This procedure was used occasionally in the early years of the Fund but has been outdated since 1961 because it "might be too inflexible in a world of rapidly changing conditions, uncontrolled to any great extent by regulatory jurisdiction of the IMF or other international organizations" (p. 91). Even after the first amendment of the IMF Articles in 1969, when the

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1. International Monetary Fund Agreement, 211 UNTS 342 (1948).

2. Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).

procedure on authoritative interpretations was updated by inserting provisions promoting more independence and equity, IMF members have refrained from requesting interpretations. The renewal of the procedure was insisted upon by France in exchange for her support for the introduction of the Special Drawing Right, an international currency issued by the IMF to supplement international liquidity. Apart from inflexibility, other explanations for the decline of authoritative interpretations are, according to the author, the extraordinary activities of the IMF due to an expanded membership, and changing conditions in international economic relations. "A litigious disposition on the part of members and prolonged legal controversy are less tolerable in a going concern. The lack of time is not the only circumstance that discourages disputation on legal matters. Members are content that, on the whole, the organization is working satisfactorily. In such conditions, members may be more disposed to accept without cavil the opinions of the institution's legal staff and to concentrate on settlement of monetary problems that are considered the true business of the institution" (p. 163).

There are reasons to reproach this explanation. In the past decades many developing members have demonstrated their discontent with the Fund's policy on conditionality, i.e. the conditions that the Fund attaches to the use of its resources. These conditions were considered to be too austere in view of the vulnerable economic position of developing countries and their populations. It would require further research why the developing countries never asked for an interpretation of Article I(v) that stipulates that the Fund provides balance of payments support "without resorting to measures of national or international prosperity". Lack of legal expertise or understanding of the Articles of Agreement might be an explanation. There could, however, also be some intimidation from industrialized countries not to push this matter by asking for an interpretation. This problem of non-interpretation cannot have passed unnoticed.

The second path consists of all interpretations that are not adopted in the procedure of authoritative interpretations (Chapter 3). Informal interpretation – usually made by the Executive Board – has become more popular because it is more flexible and less irreversible than authoritative interpretation. Informal interpretation, furthermore, lies in the hands of the members themselves, acting through persons they appoint or elect to the organs. The author even claims that "informal procedures may appear to be more compatible than formal interpretations with the ideal of collaboration with members and the IMF or among members" (p. 172). After all, "cooperation, consultation, and collaboration are all mentioned in the first purpose of the IMF set forth in Article I of the treaty" (p. 172). This opinion should not obscure the inherent advantages of formal interpretations. The formal procedure seems to be ideal for members that have a minority of votes (developing

members) because of certain safeguards in the procedure – such as the absence of weighted voting in the Committee on Interpretation. In informal procedures the majority of votes (industrialized members) determine what interpretation is to be adopted. In Chapter 3, the author further discusses the legal techniques for interpretation, such as textual analyses, the intentions of the negotiators and the meaning of purposes. He also touches on the interpretation of subordinate law.

Another procedure for interpretation is a request for an advisory opinion to the International Court of Justice. The IMF is authorized under Article 96(2) of the UN Charter to file such a request. In an attempt to explain the reasons for avoiding requests, Gold notes that the ICJ would probably be less disposed to follow a teleological approach to interpretation of the Articles of the IMF Treaty. And “even if it were disposed, it might not be sufficiently familiar with the purposes and policies of the IMF to follow a sound teleological approach” (p. 224). This remark generally illustrates Gold’s belief that outsiders may not be equipped to understand all legal intricacies of the IMF. In many cases the author refers to other scholars just to illustrate their lack of understanding of the law.

Chapter 4 discusses soft law, a concept which seems to fascinate the author as shown by earlier publications. Soft law is non-binding law which “provides an opportunity for experience and experiment” (p. 301). A breach of soft law neither incurs state responsibility nor gives reason for reparation. The IMF uses soft law for exercising its regulatory and financial jurisdiction, i.e. its powers dealing with exchange rate stability (Article IV) and balance of payments support (Article V). In the IMF’s legal system soft law appears to be promoted by withholding benefits that may be given to IMF-members. This Chapter further builds on Gold’s earlier publication on exchange rate law<sup>3</sup> and his fine contributions on the legal aspects of stand-by arrangements.

Chapter 5 examines questionable interpretation and misinterpretation: i.e. interpretations that are on the threshold of IMF jurisdiction or even beyond it. Policies and statements may be disputed because there is no basis in the Fund’s *corpus iuris*. Gold is exceptionally critical about the emerging opinion that the Fund should devote primary attention to the encouragement of economic growth and not to stability of balance of payments and currencies. Moreover, “the revisionism represented by the prominence of growth may have encouraged the IMF to creep on little cat feet into such new areas of interest and activity as poverty, military expenditure, income distribution and the environment” (p. 483). The author deplores such a development for various reasons. His most important argument is that there will be conflicts of jurisdiction with other organizations, notably the World Bank. Gold’s

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3. J. Gold, *Exchange Rates in International Law and Organization* (1988).

point of view is supported by the advisory opinion of the ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* of 8 July 1996.<sup>4</sup> In this opinion the Court developed the 'principle of speciality' meaning that a UN specialized agency, when developing activities, has to take into consideration its institutional context and the logic of the overall system contemplated by the Charter. Membership of the UN family clearly means that specialized agencies should contain their activities within their jurisdiction. However, practice of the IMF is moving in another direction. An important example is the Fund's close involvement with 'good governance' in its membership. In 1997 the IMF adopted Guidelines Regarding Governance Issues with a particular focus on corruption. The author would probably have opposed these guidelines as they expand conditionality to policies outside the jurisdiction of the IMF.

Particularly interesting in the final Chapter – entitled 'Some Retrospections and Some Insights' – is the discourse on the role of legal staff of international organization when making interpretations. A balance should be found between legally impeccable interpretation and political reality. This Chapter also shows Gold's extensive experience as general counsel and director of the legal department of the IMF since 1946. Presently, the author is senior consultant and still occupies a room in the headquarters opposite the legal department.

This book is difficult to read because the activities of the IMF are so multifaceted and its constitution leaves so much room for interpretation. Moreover, the thoroughness which the author attempts to achieve, makes the reader often feel that he is lost in a labyrinth. If the reader is not familiar with the arcane law of monetary relations he is advised to study Gold's earlier work, which is more accessible. Finally, this book is not only valuable because of its richness but also because of the punctilious use of legal language.

*Erik Denters\**

*International Institutional Law: Unity Within Diversity*, by H.G. Schermers & N.M. Blokker, Martinus Nijhoff, The Hague, 1995, ISBN 90-411-0108-X, xli and 1305 pp., US\$ 337/UK£ 218/Dfl. 475.

In the Preface to this invaluable third edition the authors provide a succinct abstract: "[t]he book offers a comparative study of the institutional law of

4. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request for Opinion by World Health Organization), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 66.

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international organizations. Although each organization has its own legal order, institutional problems and rules of different organizations are often more or less the same and, in practice, an impressive body of institutional rules has been developed. This explains the subtitle of this book: unity in diversity" (p. vi).

The study is indeed a comprehensive reference work to the various aspects of the law of international organizations covering definition and classification, participants, rules for international organs, policy-making, and administrative organs, advisory and supervisory organs, decision-making process, financing, legal order, interpretation and settlement of disputes, supervision and sanctions, legal status, external relations, and finishing with some very erudite concluding remarks. A scan through the contents of each chapter reveals the vast amount of practice and literature covered by this text.

Although the surface of the book gives an impression of it being a rather traditional exposition of the law, this is far from the truth. An analysis of practice does predominate, and for this the text is an indispensable companion for anyone interested in the practical aspects of international organizations, but there is so much more. To start with the authors clearly recognise the significance of international organizations in dealing with problems which stretch "far beyond national boundaries, requiring international solutions" (p. 1). However, this insight is not based on any functionalist preconception but on a pragmatic understanding that "in the course of this century, international cooperation between states has increasingly been structured within the framework of international organizations, which are created by states to cope with the consequences of growing interdependence" (p. 3). It is made clear that organizations are derivative in the sense that they are dependent on states who remain "the leading actors in international relations" (p. 3). Nevertheless, the authors are quick to recognise that the concept of state sovereignty has evolved from its absolute nineteenth century manifestation, to a relative concept with the advent of organizations which have contributed to giving international law more of a 'vertical' character (p. 5).

The move away from nineteenth century forms of cooperation in the shape of conferences, to international organizations is not only recognised but discussed in a subtle and informative way (e.g. p. 24). The advent of organizations with supranational characteristics is also recognised and a useful definition is provided (pp. 41-42). However, the authors eschew any temptation to paint a picture of evolutionary development towards world government by stating that "[n]o such supranational organization currently exists. Even the organization with most supranational features, the European Communities, depends to a certain extent on intergovernmental cooperation" (p. 42).

The clash between state sovereignty and the growth of interdependence is perhaps the theme that pulls the book together so that it does not simply



read as a reference book, but an intriguing analysis of the pressures that have led to the current law on international organizations. The purpose here will be to look at some areas in which the tension has produced uncertainty and sometimes obfuscation. One such area where sovereignty clashes with cooperation is the issue of withdrawal by a state from an organization where there is no provision for withdrawal. Theoretical considerations based on the integrity and objectivity of an organization, which indicate that withdrawal is unconstitutional in the absence of a clause, are generally disregarded by the authors who look at the issue in terms of practice and see that there have been numerous withdrawals in organizations. "In fact, withdrawals occurred relatively less frequently in the specialized agencies for which withdrawal is expressly provided" (p. 87). However, although the book is very much practice based, there is no simple equation of practice with law. The constitutional arguments for and against withdrawal are weighed up very carefully and a balanced conclusion which tends to favour the right of withdrawal is reached. However, the statement that "constitutions are by definition dynamic instruments" (p. 94) does recognise that the balance of power between the member states and the organization can change over the years. A similar analysis of expulsion is undertaken and the conclusion again favours the member state over the organization in terms of control by stating that "from a legal perspective, international organizations do not have the right to expel members when their constitutions do not contain an expulsion clause" (p. 104). Again though the authors recognise that the law is not that clear-cut and identify exceptions to it, indicating that there is some movement towards control by the organization of its membership by means of expulsion. The authors conclude the chapter on '*Participants*' with the following comments which for this reviewer sum up the delicacy and subtlety with which the law is handled: "[i]n view of [the] omnipotent position of the members, how can the impressive growth and functioning of international organizations in this century be explained, and with it the concomitant erosion of sovereignty of the member states? It is precisely the notion of function which helps to explain this state of affairs. Increasing interdependence, the growing need to cooperate explains why states have established international organizations to pursue certain objectives, to perform certain tasks which they could no longer carry out effectively alone. The bare need to cooperate forces states to act as loyal members of organizations created in the common general interest, and sometimes to water their sovereign wine. Why otherwise would countries which returned to an international organization, some years after an allegedly illegal withdrawal, be willing to pay some percentage of their contributions for their years of absence [...]? Why otherwise would states be willing to participate in international organizations, side-by-side with non-autonomous territories as full members [...]? Why otherwise can organizations impose conditions for the admission of new members –



conditions which are closely related to the objectives of the organization? Why otherwise would [...] an implied power of international organizations to expel an obstructive member be recognized when that prevents the organization from performing its functions" (p. 136).

As well as being an excellent compendium on the structure, powers, and practice of organizations, the above extract shows that it explores the academic and theoretical sides of the subject as well. The one (of many) themes identified here, namely the tension between sovereignty and interdependence, appears time and time again in the book. Mention can be made in particular of the area of powers of organizations (pp. 139-163), where the authors again do not accept the argument that organizations are now in legal terms on the same level as states. The doctrine of inherent powers is eschewed in favour of a wide view of implied powers which allows an organization to develop powers from its purposes and functions rather than simply from its express powers (p. 159). The state is still in control but tenuously, even formally, and the overriding test is a functional one.

A consistent approach is taken by the authors to the question of personality, where the different schools of thought, as well as practice, are analyzed in a stimulating way. While rejecting both the purely subjective and objective approaches to legal personality, the middle approach based on implied intent is embraced but the test is easily passed by organizations. Although the legal personality of organizations is still derivative, in contrast to the original personality of states, there is a presumption in favour of personality (p. 980), which signifies that although formally states have supremacy, in practice there may be little difference between the competence and powers of a state and those of an organization. It may be argued that it is time for international law/lawyers to come clean and recognise the truth – in other words to take a fully objective approach to the personality and powers of organizations, and stop treating organizations as second class citizens. However, this book provides a salutary reminder that international law is not based on ideals but on cooperation between states.

The issue of the relationship between states and international organizations is one of the themes which are brought together in a very illuminating conclusion. The others are the diversity of international institutional law on the one hand, and the unity of the rules of international institutional law on the other. Although superficially this may be seen to indicate a postmodernist disorder, the authors have clearly and painstakingly illustrated that there is indeed unity within diversity. Also the question is asked whether there is a move towards a more centralized international legal order. On this issue, the authors return to the theme of a more vertically structured international law (p. 1194). Again the authors are at the same time illuminating in their analysis and cautious. While recognising increasing verticalization due to the activities of organizations, it is made clear that the constitution of an organiza-

tion is not the same as that of the state. "Constitutions of international organizations are partial and functional, because they are limited to the area of operation of the organization and to those states which participate in it" (p. 1195). Furthermore, there is "no master organization with the central authority to accommodate conflicting actions and policies of international organizations" (p. 1195). The analysis is thought provoking and stimulates counter-argument – for instance it may be thought that the UN has the potential to be the pivotal international organization. This is built into the UN to a certain extent by Articles 53(1) and 103 of the Charter, and by ECOSOC's co-ordination of the specialized agencies. Also under Chapter VII of the Charter the UN has legal powers which do not appear to belong to states.

This book contains a wealth of carefully crafted information, practice, and analysis, which is essential for a thorough understanding of the law of organizations but which unfortunately cannot be conveyed within the confines of this review. The point of this review is to show that the book also challenges the reader to consider wider contextual issues relating to the role of international organizations in the international legal order. Such matters are issues of debate and argument which are often conducted at an abstract level in academic literature. For a powerful empirical and pragmatic contribution to this debate this book is essential reading.

*Nigel White\**

*The Law of War Crimes*, by T.L.H. McCormack & G.J. Simpson (Eds.), Kluwer Law International, The Hague/London/Boston, 1997, ISBN 9044102736, 272 pp., US\$ 114/UK£ 77/Dfl. 175.

The United Nations scheduled the Conference of Plenipotentiaries on the Establishment of an International Criminal Court to take place in Rome, Italy, from 15 June to 17 July 1998. Despite the different prognoses on chances of a success or defeat of this initiative, the Conference marks, for the time being, the final step in a development within the United Nations which started with the deliberations in the United Nations Commission for the Investigation of War Crimes in 1943, thus constituting a "journey from Nuremberg to The Hague" (p. xvii).

The present compilation of articles, by different authors, on the international and domestic aspects of current international criminal law, is an impressive illustration of the editors' conclusion that "there is the inevitable contradiction between legal process and political or diplomatic imperatives"

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and that “any international criminal regime is likely to be the result of a compromise between these two” (p. 253). “The commitment to legality and the rule of law in the face of political pressure” is the essential precondition for a permanent international criminal court to become “one of the UN’s most significant institutions in the 21st Century” (p. 254).

The editors provide an excellent contribution to the ongoing discussion in the practice of states as well as in literature. They share their thorough knowledge and research results with anyone interested in what is probably the prevalent topic of international law on the agenda of the international community today. It is a highly recommendable analytical work which will clearly not lose its value after a possible institution of a permanent criminal court, but retain its extraordinary significance.

The authors contributing are all experts in the field of war crimes and international criminal law. Despite any individual specificities of authors, all contributions are characterised by a remarkably clear structure and methodology. The articles cover the problem of war crimes in the sense of individual criminal responsibility for violations of international humanitarian law. In this respect, both the material offences under international criminal law and the prosecution aspects of individual trials are examined. This examination is conducted on the national as well as the international level. Whereas these two levels are traditionally treated separately, the recent developments since the institution of the International Criminal Tribunal for the former Yugoslavia have shown how significantly domestic criminal lawyers, national criminal law, jurisdiction, lawmaking, and policy – especially in Europe – have been influenced by international criminal law. Germany, for example, got into acute difficulties after the arrest of Duško Tadić in Munich.<sup>1</sup> It was confronted with having a conflict of obligations under international law, on the one hand, being the obligations to co-operate with and to assist the Tribunal in The Hague arising from Articles 25, 39, 41, and 49 of the UN Charter, and the demands arising from German constitutional and national law, on the other hand. At the time, the existing German law regulating the extradition of arrested persons referred to the extradition to other states only, not to international institutions and organs. It thus did not provide a legal basis for Tadić’s transfer to the Tribunal.<sup>2</sup>

1. Duško Tadić was arrested in Munich on 12 February 1994 and, late April 1995, became the first accused to be transferred to the ICTY. On 7 May 1997, the Tribunal found him guilty of crimes against humanity as well as of violations of the laws or customs of war and sentenced him to 20 years imprisonment on 14 July 1997, *Prosecutor v. Tadić, Sentencing Judgment, Case No. IT-94-I-T* (<http://www.un.org/icty/index.html>).
2. A new law was instituted on 10 April 1995, regulating the transferral to the ICTY, *see, Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien (Jugoslawien-Strafgerichtshof-Gesetz)* of 10 April 1995, reproduced in *Bundesgesetzblatt der Bundesrepublik Deutschland (BGBl.)* 1995 I, 485-487. German legislation clearly distinguishes between ‘extradition’ between states and ‘transferral’ to international institutions.

Gerry J. Simpson introduces the chapters with a "critical introduction" to war crimes (pp. 1-30). He touches upon the most crucial doctrinal problems concerning not only war crimes, but individual responsibility for violations of international law in general, namely the problems of partiality and legality, as well. He elaborates on the blemishes on the trials of Nuremberg, Tokyo, The Hague, and Arusha as well as any further *ad hoc* tribunal (e.g., Cambodia) in terms of a 'victor's justice' and of arbitrariness in selecting conflicts in which an international criminal prosecution is imposed and the differences between these trials. It is with realistic temperance that he states the unavoidable dilemma between the pragmatic and the idealistic approach and any practical efforts between these poles (pp. 7-8). As regards the problem of legality, the principle *nullum crimen sine lege* (p. 11 *et seq.*) will be less difficult to be applied by a possible permanent international criminal court than by the Military Tribunals of Nuremberg and Tokyo, and by the Tribunals in The Hague and Arusha. Nonetheless, given the fact of the still rather vague formulation of criminal offences, the problem will continue to exist. If and to what extent the defence of sovereign immunity will be recognised by the ICTY remains to be seen should Karadžić and Mladić be tried in The Hague. One of the most serious problems in international criminal law is the lack of an international enforcement instrument, a problem signalled by Simpson and described as the lack of "a public law dimension" (p. 16). He correctly qualifies the direct responsibility of individuals under international law, without mediation of the individual's national criminal law being necessary, as the recently evolved scope of application of international criminal law (p. 18 *et seq.*).

The introduction is concluded by observations on ideological aspects of international criminal law and international criminal trials (pp. 19-28). Simpson appears to be sympathetic to the appraisal of war crimes trials as fig-leaves for political and diplomatic deficiencies and failures (p. 24). Although largely sharing this qualification, it has to be kept in mind that states still distinguish between the judgment of certain applications of means and methods of warfare as unlawful or as lawful and as entailing criminal responsibility of the individual or not. Yet, this distinction does not mean that 'simple' violations of international humanitarian law not constituting grave breaches and not entailing the individual's responsibility may be undertaken "without moral or legal inquiry" (pp. 24 and 26). On the other hand, Simpson's scepticism with regard to the chances of international criminal law to

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The new law is limited in scope of application insofar as it is not applicable to German nationals, the German Basic Law up to the present prohibiting the extradition and transferral of German nationals in its Art. 16, para. 2, and not regulating any possible transferral to the International Criminal Tribunal for Rwanda. For the German Basic Law, see, Grundgesetz der Bundesrepublik Deutschland of 23 May 1949, reproduced in Bundesgesetzblatt der Bundesrepublik Deutschland (BGBl.) 1949 I, at 1 *et seq.*

increase the level of compliance with humanitarian and human rights law (p. 29) can only be shared, as the chances of an actual international prosecution are but a little bit more likely than those of a national one.

This doctrinal and philosophical introduction is followed by Timothy L.H. McCormack's examination of the historical evolution of an international criminal law regime (pp. 31-63). He bends the bow from efforts to limit the conduct of hostilities in ancient and medieval civilisations, the treatment of war crimes and war criminals in the aftermath of World War I, the Tribunals of Nuremberg and Tokyo, the negotiation and ratification of the Genocide Convention, and to the deliberations and activities in the UN International Law Commission before the institution of the International Criminal Tribunal for the former Yugoslavia. Special mention should be made here to McCormack's elaboration on the Leipzig Trials in the aftermath of the World War I (pp. 48 *et seq.*). He analyses both the reasons and the impact of the failure to prosecute German suspects of war crimes before the German Supreme Court in Leipzig (the *Reichsgerichtshof*). McCormack's study of the UN member states' positions in the General Assembly's Sixth Committee and the International Law Commission's discussions culminates in his proving that states basically lacked the political will truly to institute an international criminal responsibility. This want of political will also caused the ultimate failure of this initiative. He gives priceless evidence of the very early recognition of criminal responsibility of individuals for violations of the "law of nations" (p. 62), albeit that the enforcement of that responsibility fell within the domestic jurisdiction of states. McCormack shows very clearly that the International Tribunals of Nuremberg and Tokyo, as well as of The Hague and Arusha, have been *ad hoc* solutions in view of the lack of any permanent institution authorised to prosecute individuals for violations of international humanitarian law (p. 62-63).

Axel Marschik discloses the shift of focus from the international to the national perspective. He elaborates on European approaches to war crimes (pp. 65-101), and identifies an – albeit domestic – "European tradition in punishing" war criminals (p. 66). It is arguable whether his wording of dealing with "humanitarian crimes" relating to "violations of international humanitarian law" (p. 67) is appropriate and necessary, but his aim to examine a (regional) customary law rule of individual criminal responsibility for such humanitarian crimes and the obligation for states to try those individuals, is laudable. He maintains such an *opinio iuris* as one of the two elements necessary for the creation of a rule of customary international law (p. 73) and examines in depth the domestic approach to humanitarian crimes in the state practice of Germany, Austria, the United Kingdom, The Netherlands, Spain, and the Eastern European states. This section contains an impressive exercise in comparative law, and it is only a pity that Marschik could not have had recourse to the results of the work of the International

Society for Military Law and the Law of War<sup>3</sup> which at the time were still to be published. The author's survey of the European states' legislation and of their policies regarding the ICTY may but to a limited degree contribute to proving a rule of customary law to the effect that suspects of war crimes should be tried. One can only agree with his final conclusion that a European customary rule to prosecute and punish humanitarian crimes so far has not evolved fully.

This national *tour d'horizon* is continued by Jonathan M. Wenig in his contribution on the prosecution of non-Jewish and Jewish war criminals in Israel (pp. 103-122). He stresses impressively that Israel's approach to war crimes is "deeply personal and has been coloured by the State's history and pre-history" (p. 103). He concentrates on war crimes and criminals of the Second World War. In the absence of a territorial or universal connection respectively, the unique nature of this state's existence has provided an additional "linking-point" (p. 104) between war crimes and the state of Israel. After a review of the legislation and jurisdiction with respect to the prosecution of Nazi war crimes, Wenig examines the crucial cases of Eichmann and Demjanjuk. Finally, he notes with respect to the trials of Jewish collaborators and Jewish policemen in concentration camps during World War II, that they were the "most divisive for Israel society" (p. 121) and draws the conclusion that war crimes issues are best dealt with by national courts instead of international tribunals.

The situation of war crimes legislation in Australia is being illuminated by Gillian Triggs (pp. 123-149), a situation described as "spasmodic, selective and short" (p. 123). Australia has been involved in the prosecution of war crimes committed during World War II in various ways, but closed all files in 1992, for political reasons and practical purposes. Due to Australia's 1995 legislation for assistance to the Tribunals for the former Yugoslavia and for Rwanda, Triggs recognises a possible reluctance to conduct war crimes prosecutions in Australia and a likely favour for international prosecutions, be it by *ad hoc* tribunals or, preferably, by a permanent international criminal court. She anticipates customary international law and treaty law to contribute increasingly importantly to the development of Australian domestic criminal law (p. 137).

The national *tour d'horizon* is closed by Sharon A. Williams who discusses the prosecution of war criminals in Canada (pp. 151-170). She starts from observations on the prosecution of crimes committed during World

3. The Society designated a rapporteur for each of the member states reporting on a questionnaire dealing with the respective national laws on the investigation and prosecution of violations of the law of armed conflict. The first part of the questionnaire (13 questions) was dedicated to national laws and procedures, the second one (10 questions) related to military and legal cooperation. These national reports have been collected for the XIVth International Congress of the Society which took place in Athens, from 10-15 May 1997.



War II and then turns to the possibilities of legislating for prosecuting crimes committed outside of Canada and proscribed as war crimes and crimes against humanity. Canada was involved in trials in Germany, but ceased this activity with the repatriation of Canadian troops. Administrative and legislative action was again taken up in 1985 when the Canadian media alleged that an impressive number of war criminals was residing in Canada as naturalised Canadian citizens (p. 154 *et seq.*). Contrary to the recommendation of a specially instituted commission for revocation of citizenship and deportation (p. 157), the Canadian government provided for prosecutions to take place in Canada using extraterritorial bases of jurisdiction over the offence (p. 159 *et seq.*). Given that, Williams shows that the actual practice of Canadian courts is not yet in line with this governmental decision. The courts, for several reasons, felt unable to prosecute the accused for the commitment of war crimes or crimes against humanity (pp. 163-169). She hence identifies a “turn to the denaturalisation and deportation route” in Canadian practice (p. 170).

Again drawing the link between the national prosecution level and the international one, Roger S. Clark refocuses on the four international tribunals which have prosecuted individuals for the violation of international humanitarian law. Whereas Clark follows the chronological order by starting with observations on the Tribunals of Nuremberg and Tokyo (pp. 171-187), his perspective is not a historical, but a contemporary one. Although they had a substantial impact on the development of international criminal law offences, on efforts to create a permanent international criminal court, and on the creation of a substantial body of international criminal law (pp. 184-185), Clark very rightly stresses that the Nuremberg and Tokyo Tribunals are not predecessors of the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda. He underlines the fact that the offences dealt with in Nuremberg and Tokyo went beyond violations of humanitarian law in the strict sense, in recognising the offences of crimes against peace and crimes against humanity. Clark takes a rather progressive position with regard to the acceptance of international criminal law in general, i.e., offences as well as procedures, in customary international law and in treaty law (pp. 184-187). Yet, one cannot deny the fact that states in all fora – especially in gremia of the United Nations – have always stressed, first, the uniqueness of the offences dealt with and procedures applied in Nuremberg and Tokyo, and second, their reluctance to consider any further application at the international level. States always made and still make it very clear that the application of any legal rule by their criminal courts is an expression of their national jurisdiction and national sovereignty. Concerning the issue of offences, international criminal law, however widely defined, presupposes at least that the responsibility of the individual flows directly from the international law provision – treaty or customary – without any mediation by the national

criminal law system. As regards the question of jurisdiction and procedure, namely the obligation to try or extradite suspected war criminals, the practice of states is not regulated by international treaty law and past and actual practice is much too inconsistent to have developed into a rule of customary international law.

Christopher Blakesley gives a further in depth examination of the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda (pp. 189-228). He gives an excellent survey of the various problems that arose during the recent development of these Tribunals. The problems of the factual circumstances and conditions and how they developed, the legal bases and the jurisdiction of the Tribunals, the substantive law on the offences to be tried, possible justifications for the violation of international humanitarian rules, the procedure to be instituted and applied with special emphasis on protective rights for the accused, but also on protective provisions for victims and witnesses, and, finally, matters of international judicial cooperation are all analysed in many aspects. Taking into account the limited space for this exercise, this is all the more surprising. Blakesley founds his analysis on the understanding that a failure of both *ad hoc* Tribunals, and probably ICTY the more so, implies the risk of a depreciation of international law and of making "a mockery of individual responsibility" (p. 191). He strongly promotes the view that, despite all contended dangers, the success of the ICTY could significantly strengthen the peace process in that region (p. 193). One can only join Blakesley in his judgment that both Tribunals have caused several states "to give more serious consideration to the possibility of the creation of a permanent court" (p. 227) and add one's hope that states will be able to overcome their concerns regarding preservation of their sovereignty during the Conference of Plenipotentiaries on the Establishment of an International Criminal Court soon to take place.

The concluding chapter again by McCormack and Simpson is devoted to the question whether the goals of establishing a (new) legal regime and of instituting international criminal enforcement instruments has been achieved or are likely to be achieved in the near future (pp. 229-254). In this chapter, the International Law Commission's Draft Statute for an International Criminal Court<sup>4</sup> as well as its Draft Code of Crimes Against the Peace and Security of Mankind<sup>5</sup> are contemplated. With regard to the first instrument, the authors conclude that its realisation may now require "political, rather than jurisprudential, solutions" (p. 247). In spite of the fact that the examined draft of the ILC has undergone various changes, amendments, and

4. United Nations International Law Commission's Report of the Working Group on a Draft Statute for an International Criminal Court, 16 July 1993, UN Doc. A/48/10, Annex, reproduced in: UN Doc. A/49/10 (1994).

5. UN Doc. A/46/10 (1994).

shifts of focus in the Preparatory Committee established for the preparation of the Conference of Plenipotentiaries mentioned earlier, this conclusion is even the more valid on the very eve of the Conference. The Draft Code of Crimes Against Peace and Security of Mankind is principally an independent instrument which seeks to codify international crimes the jurisdiction over which is dependent on states' membership to the statute of a permanent international criminal court. McCormack's and Simpson's judgment that it suffers from significant weaknesses due to the lack of, first, consistency in the drafting of the offences, second, the inclusion of substantive generally accepted offences, and third, a systematic approach to existing international criminal law (pp. 250 *et seq.*), culminates in their qualification of the Draft Code as an unworkable basis for renewing international criminal law (p. 229).

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*The Concept of International Obligations Erga Omnes*, by M. Ragazzi.  
Clarendon Press, Oxford, 1997, ISBN 0-19-826480-1, xl and 264 pp.,  
UK£ 50.

On the dust jacket, the present monograph is presented by the publisher as “the first definitive work focusing specifically on obligations *erga omnes*”. Unfortunately for publisher and author, it is not. On 21 November 1996, the date under the acknowledgments, Kluwer Law International had already published *Obligations Erga Omnes and International Crimes* by André De Hoogh. Neither the publisher nor the author refers to this work that was published in the first quarter of 1996. Although the present monograph is thus not the “first” work on obligations *erga omnes*, it is, arguably, for the time being the “definitive” work on the criteria for the identification of obligations *erga omnes*.

The proclaimed aim of the author is to discuss the characteristics and criteria for the identification of obligations *erga omnes* (p. xii). The obvious point of departure of the author’s quest is the famous *dictum* of the International Court of Justice (ICJ) on obligations *erga omnes* in the *Barcelona Traction* case<sup>1</sup> (Chapter 1). In this case, the Court distinguishes between obligations towards another state and obligations towards the international community as a whole or obligations *erga omnes*. The work proceeds with a valuable analy-

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1. See *Barcelona, Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase*, Judgment of 5 February 1970, 1970 ICJ Rep. 3, at 32, para. 33.

sis of 'selected prefigurations' of the concept of obligations *erga omnes* in Chapters 2 and 3. In the concepts of state servitude, permanent dedication, international status, objective regimes, and *ius cogens*, the author detects embryonic elements of obligations *erga omnes*. In these chapters, the author convincingly demonstrates that the recognition of obligations *erga omnes* by the Court did not come out of the blue. These chapters are followed by an extensive analysis of the obligations *erga omnes* identified by the Court in the *Barcelona Traction* case, viz. the outlawing of acts of aggression (Chapter 4), the outlawing of genocide (Chapter 5), protection from slavery (Chapter 6), and protection from racial discrimination (Chapter 7). Selected candidates of obligations *erga omnes* are the subject of Chapters 8 and 9. The author discusses the possible *erga omnes* character of obligations in the area of human rights in addition to those identified by the Court in the *Barcelona Traction* case, in the area of development law, in the area of environmental law, and with respect to the non-recognition of unlawful situations. Although any reasoned selection is ultimately within the discretion of an author, an obvious candidate is not discussed, viz. the rights and obligations related to the use of natural resources of areas beyond the limits of national jurisdiction, especially if such resources belong to the common heritage of mankind. In Chapter 10, the complex relationship between the concepts of obligations *erga omnes*, *ius cogens*, and *actio popularis* is addressed. The correlative rights of obligations *erga omnes* and the remedies available in case of their breach are touched upon in this Chapter. Maurizio Ragazzi adheres to the widely accepted conclusion in the doctrine that the recognition of obligations *erga omnes* by the Court does not necessarily imply the recognition of the existence of a sort of *actio popularis* in international law (p. 212). However, he does not develop the interrelationship between these two concepts further. Admittedly, this is not the aim of the author, yet one would have expected an analysis of Article 40 of the 1996 Draft Articles on State Responsibility of the International Law Commission (ILC) on the injured state's right to bring claims.<sup>2</sup> The author concludes his treatise with general conclusions, including a list of five common elements by which, in the author's view, obligations *erga omnes* can be identified. According to the Maurizio Ragazzi, obligations *erga omnes*: (a) are narrowly defined; (b) are prohibitions rather than positive obligations; (c) are 'obligations' in the strict sense of the term; (d) belong to *ius cogens* and are codified by quasi-universal treaties; and (e) reflect basic moral values (p. 215; see already pp. 132-134).

These common elements are derived from the four examples mentioned by the Court in the *Barcelona Traction* case. This is a narrow basis to draw conclusions from. Maurizio Ragazzi has also found that these four examples are examples of *ius cogens*. Hence, it is not clear whether a common element re-

2. UN Doc. A/CN.4/L.533 and Add.1 (1996).

lates to the characterization of an obligation as an obligation *erga omnes* or to its characterization as *ius cogens*. The author seems to be aware of this as he states that the above-mentioned five common elements cannot be regarded as “prescriptive criteria that each obligation *erga omnes* must necessarily satisfy” (p. 215; *see also* p. 134). Hence, the reader is left in doubt as to what the criteria for the identification of obligations *erga omnes* actually are.

The limitation of the work’s scope to characteristics and criteria for the identification of obligations *erga omnes* has been the conscious choice of the author (pp. xi–xii). Legal implications of the recognition of obligations as obligations *erga omnes*, such as the correlative rights of obligations *erga omnes* and the remedies available in case of their breach, are only touched upon (*see* in particular Chapter 10). This approach is justified by the author’s view that the legal implications of obligations *erga omnes* “are still highly controversial and are likely to remain so unless the essence of the concept is more clearly grasped” (p. xii). It is true that the identification of obligations *erga omnes* has been somewhat neglected and that the present work fills a gap in the literature. However, the argument can be reversed. The distinction between different categories of obligations, such as the one drawn by the Court between obligations towards another state and obligations towards the international community as whole, is only useful if such distinction serves a certain legal purpose. It is such purpose that will determine the need to qualify a certain obligation as an obligation *erga omnes* and the support for such qualification by states and other subjects of international law. Hence, the criteria for the identification of obligations *erga omnes* are likely to be controversial if the legal implications of the recognition of a certain obligation as an obligation *erga omnes* are not clear. The identification of obligations belonging to a certain category and of their legal implications is clearly a dialectic process.

The disregard for the legal purpose of the distinction drawn by the Court between obligations towards another state and obligations towards the international community as a whole seems to have its origin in the author’s finding that obligations *erga omnes* reflect ‘basic moral values’. The work is permeated by the author’s belief that this characteristic is essential and distinctive. Thus, for Maurizio Ragazzi, it is “wholly unacceptable to suggest in general terms [...] that the defining characteristic of obligations *erga omnes* is that their breach affects all States (or, in the case of obligations *erga omnes partes*, all its addressees). This proposition, by reversing the order of priority between cause and effect, is unduly restrictive: it reduces the fundamental problem of the content of obligations *erga omnes* and the values they protect to issues of legal technique” (p. 202). Yet, it appears from the *Barcelona Traction* case that much can be said in support of the idea that the recognition of obligations *erga omnes* is rooted in the special procedural consequences connected with

the violation of such obligations.<sup>3</sup> It should not be neglected that the ICJ stresses “the importance of the rights involved”<sup>4</sup> and not the importance of the obligations involved. Since obligations *erga omnes* are obligations towards the international community as a whole, the holder of the rights correlative to obligations *erga omnes* is the international community as whole. This essential feature of obligations *erga omnes* is noted, but not discussed by the author (see note 1, p. 1). Yet, it is perfectly conceivable that the legal indivisibility of the rights of the international community as a whole – and not the involvement of basic moral values – has necessitated the recognition of the potential legal divisibility of the rights of protection corresponding with obligations *erga omnes*. Apparently faced with the problematic issue of international personality of the international community as a whole and, hence, with its capacity to maintain its rights by bringing international claims, the ICJ envisages a legal divisibility of the rights of protection corresponding with obligations *erga omnes*. It finds that “all States can be held to have a legal interest in their protection”.<sup>5</sup> Obligations *erga omnes* are therefore “the concern of all States”,<sup>6</sup> but this does not necessarily mean that they reflect ‘basic moral values’. The examples of obligations *erga omnes* given by the Court clearly reflect basic moral values, but this characteristic can arguably be based on their qualification as *ius cogens*. Maurizio Ragazzi opines that “both peremptory rules and obligations *erga omnes* are meant to protect basic moral values, and they both require significant support within the international community” (p. 189). Yet, he finds it “reasonable to assume that the rules from which [obligations *erga omnes*] derive will, as a rule, meet the tests of *ius cogens*” (p. 200). It does, however, not become clear what then, in the author’s view, distinguishes the two concepts. The rejection of the suggestion that it is precisely the protection of basic moral values that characterizes *ius cogens* and distinguishes it from obligations *erga omnes* is not substantiated.

From the finding that obligations *erga omnes* reflect basic moral values it is a small step for the author to conclude that they are universal obligations binding on all states (pp. xiii, 17, and 161). This conclusion is upheld, even though the author himself produces examples that point to the contrary (p. 159 on the prohibition to dispose of radioactive and nuclear wastes in a state’s territorial sea; p. 175 on the binding effect of unilateral declarations; and p. 179 on the prohibition of atmospheric nuclear testing). The author accommodates these examples as a sub-group of obligations opposable to *all* states that sat-

3. See also R. Lefeber, *The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law, The International Community and Common Interests*, 21 NYIL 81, at 92 (1990).

4. Barcelona Traction case, *supra* note 1, at 32, para. 33.

5. *Id.*

6. *Id.*



isfy certain conditions (pp. 159 and 179) or simply discards them as a derivative application that does not need to be discussed (p. 175).

Furthermore, the emphasis on 'universality' leads the author to largely ignore and even reject the existence of obligations *erga omnes* on a sub-global level (pp. 159 and 196). This too seems to have its origin in the author's belief that obligations *erga omnes* reflect basic moral values which are universally shared. However, the existence of sub-global obligations *erga omnes* makes perfect sense if the essential and distinctive criterion of obligations *erga omnes* is derived from the special procedural consequences connected with the violation of such obligations. Within treaty communities and regional communities too, the distinction between obligations towards another state within that community and obligations *erga omnes* may enhance the judicial protection in case of the breach of an obligation.

One does not have to agree with an author's findings to appreciate his work. This work most certainly fills a gap in the literature and will, hopefully, stimulate a much-needed discussion on the identification of obligations *erga omnes*. It is a not to be neglected piece of work by an author who has visibly put much effort and care in writing and putting it together. It is, however, not the final work on the concept of obligations *erga omnes*, but also that has not been claimed by Maurizio Ragazzi in his treatise on the criteria for the identification of obligations *erga omnes*.

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